

The seal of the Government of Madhya Pradesh is a circular emblem. It features a central shield divided into four quadrants: top-left with a crescent and star, top-right with a conch shell, bottom-left with a bull, and bottom-right with a lion. The shield is flanked by two elephants. Above the shield is a crown-like element. The entire emblem is encircled by a border containing the text 'UNITE WE STAND DIVIDE WE FALL' at the top and 'सत्यमेव जयते' at the bottom. Below the seal is the year 'MDCCCXX' (1920).

No. 11-1941 RC

F. Barrett. This case became ready for decision on September 23, 2013, the date the last written argument was filed.

Findings of Fact

1. Samples was licensed by the Board as a respiratory therapist. His license was current and active at all times relevant to this action.
2. Samples' license expired on July 31, 2012, and has not been renewed.
3. On July 17, 2009, and July 15, 2010, Samples was employed as a respiratory therapist at St. Luke's Hospital ("St. Luke's") in Chesterfield, Missouri.
4. As a respiratory therapist, Samples administered treatments including:
 - a. Routine nebulizer treatments, which involve the administration of medicine into the lungs through breathing;
 - b. CPAP (continuous positive airway pressure) and BiPAP (bilevel positive airway pressure) for patients with sleep apnea;
 - c. Intensive care work, including ventilator settings, arterial blood gas samples, and respiratory assessments; and
 - d. Hyperbaric medicine, which involves placing patients in a pressurized chamber with 100-percent oxygen for between ninety minutes and two hours.
5. Each of these jobs required direct patient contact. Many of the jobs, especially in intensive care, required critical decision-making skills for patients in life-and-death situations.
6. Emergency situations may arise in the hyperbaric chamber, including an oxygen toxicity seizure, a spontaneous pneumothorax, or a deflated lung. If any of those conditions or another emergency arose, the respiratory therapist had to conduct an emergency evacuation of the hyperbaric chamber and call a physician.

7. St. Luke's had a drug- and alcohol-free policy during the entire time that Samples worked there. Under that policy, "testing positive for alcohol ... while performing St. Luke's business or while on St. Luke's property is prohibited."¹ St. Luke's instituted the alcohol-free policy to enhance the welfare of its patients.
8. St. Luke's maintained an Occupational Medicine Department. Mercy Corporate Health ("Mercy") is the vendor that runs Occupational Medicine for St. Luke's.
9. Mercy uses an AlcoMonitor CC machine, serial number 001430 ("the AlcoMonitor"), to conduct breath alcohol tests on St. Luke's employees as needed as well as on other consumers. Mercy employees used this machine to conduct Samples' breath alcohol tests.
10. The AlcoMonitor was recertified for calibration by Intoximeters, Inc. ("Intoximeters"), its manufacturer, in March 2009.
11. The AlcoMonitor was checked for calibration on both July 1, 2009, and July 1, 2010.

These tests were automatic tests run by the machine at a set time: 12:01 on the first day of the month. Both of these tests were within .002 of the test value, which is acceptable for law enforcement purposes in the Missouri. The standard for checking calibration for breath alcohol machines in Missouri is once every 35 days.

The July 17, 2009 Test

12. Samples drank bourbon and Coke "consistently" at his home on July 16, 2009, between 6:00 PM and 9:00 PM.² He did not consume alcohol on July 17, 2009.

¹ Pet. Ex. D-16, D-33.

² Pet. Ex. S at 22.

13. On July 17, 2009, Samples was assigned to the hyperbaric unit. He clocked in at 5:56 a.m.³
14. Jane Kelly, Samples' supervisor, smelled alcohol on Samples' breath. She contacted Jacqueline Holloman, the director of respiratory care for St. Luke's, to report that Samples had alcohol on his breath.
15. Hollomon is a registered respiratory therapist and has been director of respiratory care for St. Luke's for twenty years.
16. Holloman went to the hyperbaric unit at approximately 10:00 A.M. and smelled alcohol on Samples. There were patients in the hyperbaric chamber at that time.
17. Holloman ordered Samples to take a breath alcohol test. Holloman accompanied him to Occupational Medicine where the breath alcohol tests were administered.
18. Stephanie Nehls conducted the breath-alcohol test, using the AlcoMonitor.
19. Nehls followed the testing protocol on which she had been trained. That protocol is substantially similar to the standards used by United States Department of Transportation in 49 CFR § 40.241, .243 and .253.
20. Nehls verified Samples' identity. Samples did not eat or drink anything in Nehls' presence prior to the test. Nehls selected a straw at random and showed Samples that it had not been tampered with. Nehls unwrapped the straw and placed in the AlcoMonitor. Nehls then had Samples blow into the AlcoMonitor.
21. Samples' first test showed that he had a blood-alcohol level of .087.
22. Nehls then had Samples wait for fifteen minutes before a second test.

³ Samples and Holloman gave differing times that Samples reported for work. We rely on the recorded time that Samples punched in. Resp. Ex. E at 10.

23. Neither Nehls nor Samples left the examination room during the fifteen minutes between tests. Samples did not eat or drink anything and did not use the restroom during that time.
24. After fifteen minutes, the AlcoMonitor reset itself and cleared alcohol from its system. Nehls randomly selected a second straw, showed Samples that the straw had not been tampered with, unwrapped it, and placed it in the machine. Samples then blew into the machine.
25. Samples' second test showed that he had .078 percent blood-alcohol content.
26. Samples then accompanied Holloman to Human Resources. He told Holloman that he consumed alcohol the night before.
27. Samples signed a "drug-free workplace agreement" with St. Luke's after that alcohol test.
28. That agreement states that he violated St. Luke's "Drug Free Workplace Policy" and that he will participate in an employee assistance program ("EAP").
29. Under that agreement, Samples agreed to random alcohol and drug testing and to participate in "aftercare," "evening intensive outpatient," and Alcoholics Anonymous meetings. Samples also was required to take random breath alcohol tests as a condition of his employment for a period of two years.

The July 15, 2010 Test

30. Samples drank bourbon and Coke "consistently" on at his home on July 14, 2010, between 6:00 PM and 9:00 PM.⁴ He also had been out drinking with friends on the evening of July 14, 2010.⁵ He did not consume alcohol on July 15, 2010.

⁴ Pet. Ex. S at 29.

⁵ Resp. Ex. I at 23.

31. On July 15, 2010, Samples was assigned to the hyperbaric unit. He clocked in to work at 5:54 a.m.⁶ and reported to work in the hyperbaric unit.
32. Kelly smelled alcohol on Samples' breath. She contacted Holloman to report that Samples had alcohol on his breath.
33. Holloman went to the hyperbaric unit at approximately 8:00 AM and smelled alcohol on Samples. There were patients in the hyperbaric chamber at that time.
34. Holloman ordered Samples to take a breath alcohol test and accompanied him to Occupational Medicine, where the breath alcohol tests were administered.
35. Jeanene Jorgensen conducted the breath alcohol test, using the AlcoMonitor.
36. Jorgensen followed the testing protocol on which she had been trained. That protocol is the same one that Nehls employed in Samples' 2009 breath alcohol test.
37. Jorgensen verified Samples' identity. Jorgensen then had Samples blow into the AlcoMonitor.
38. Samples' first test was void because of insufficient breath.
39. Samples' second test showed that he had a blood-alcohol level of .059.
40. Jorgensen then had Samples wait for fifteen minutes before a second test.
41. Neither Jorgensen nor Samples left the examination room during the fifteen minutes between tests. Samples did not eat or drink anything and did not use the restroom during that time.
42. During that fifteen-minute waiting period, Samples told Jorgensen "My wife was out of town. She left wine in the refrigerator. What was I supposed to do?"⁷ After fifteen

⁶ Samples and Holloman gave differing times that Samples reported for work. We rely on the recorded time that Samples punched in. Resp. Ex. F at 6.

⁷ Tr. 137.

minutes, the AlcoMonitor reset itself through an “air-blow” test and cleared alcohol from its system. Jorgensen randomly selected a second straw, showed Samples that the straw had not been tampered with, unwrapped it, and placed it in the machine. Samples then blew into the machine.

43. Samples’ third test showed that he had .057 percent blood-alcohol content.

44. Holloman then fired Samples for violating St. Luke’s policy on alcohol.

Evidentiary Issues

We deferred ruling on the admission of Petitioner’s Exhibit D, pages 70-73, and the issue of spoliation in the deposition of Terry Lytton, Petitioner’s Exhibit I. We asked the parties to brief these issues. The Board addressed both of these issues in its post-hearing brief. Samples briefly addressed Exhibit D and did not address Exhibit I.

Exhibit D

Pages 68 through 75 of Petitioner’s Exhibit D consist of a business records affidavit signed by Laura Lashley, custodian of records for Mercy Corporate Health,⁸ (D-68 and D-69), three pages of records downloaded from the AlcoMonitor (D-70, 71, and 72), a certificate showing that the AlcoMonitor was certified for calibration and accuracy in March 2009 (D-73), and two calibration check records from the AlcoMonitor dated July 1, 2009, and July 1, 2010 (D-74 and D-75).

Samples does not object to D-74 and D-75. Tr. 322. He also does not object to the business records affidavit, D-68 and D-69. *Id.* Samples objects to the remaining pages because the records were created by Intoximeters, Inc., the manufacturer of the AlcoMonitor, and argues that they cannot be certified as a business record by Lashley, who was not an Intoximeters

⁸ MercyCorporate Health is the vendor that runs Occupational Medicine for St. Luke’s.

employee. He also objects because the records created by Intoximeters contain more pages than Lashley attached to her affidavit; in other words, that the records are not complete.

Samples' objection might have merit if this were a civil case in the circuit court.

However, the General Assembly has set out specific rules governing the admission of evidence in administrative proceedings. Section 536.070(10)⁹ explicitly states that

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of an act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. . . .

As a court construing this statute has stated: “[t]he administrative law judge may determine from the totality of the circumstances whether the document meets the criteria; the document's custodian or preparer need not be present to sponsor the document.” *Associated Wholesale Grocers v. Moncrief*, 955 S.W.2d 37, 38-39 (Mo. App. S.D. 1997), *quoting State ex rel. Sure-Way Transp., Inc. v. Division of Transp., Dept. of Economic Development*, 836 S.W.2d 23, 27 (Mo.App. W.D. 1992).

Exhibit D-73, the calibration certificate, was made because Intoximeters inspected the AlcoMonitor as part of the course of its business and as the record of its inspection. Pet. Ex. G at 49-51.¹⁰ This record is a memorialization of that act, kept by Mercy in the regular course of *its* business. It is admissible under § 536.070(10).

⁹ RSMo 2000. Unless otherwise noted, statutory references are to the 2012 Cumulative Supplement to the Missouri Revised Statutes.

¹⁰ Exhibit D-73 is identical to Exhibit 9 in the deposition of Linda Lashley, Pet. Ex. G.

Exhibits D-70, D-71, and D-72 are printouts from the AlcoMonitor and provide the results of tests conducted on that machine.¹¹ Lashley requested that Intoximeters print that information. Thus, D-70, D-71, and D-72 are records of events – the tests run by the AlcoMonitor. The tests were recorded in the memory of the AlcoMonitor at the time of the tests and are also kept by Mercy in the regular course of its business. D-70, D-71, and D-72 are admissible under § 536.070(10).

D-70, D-71, and D-72 are not inadmissible because they are not a complete printout of the AlcoMonitor's memory. In order to "ensure that no evidence is admitted out of context," "the rule of completeness provides that 'where either party introduces part of an act, occurrence, or transaction, the opposing party is entitled to introduce or inquire into other parts of the whole.'" *State v. Marshall*, 410 S.W.3d 663, 672 (Mo.App. S.D. 2013), *quoting State v. Jackson*, 313 S.W.3d 206, 211 (Mo.App. E.D. 2010). The way for Samples to counter the introduction of D-70, D-71, and D-72 was to subpoena the remainder of the exhibit and introduce the portions of it that he felt were favorable to his case. He cannot, however, merely complain that D-70, D-71, and D-72 were inadmissible because they did not comprise the entire record of the AlcoMonitor.

Exhibit I

Samples objects to Petitioner's Exhibit I – the deposition of Terry Lytton, an investigator for the Board – because Lytton destroyed his notes made during the investigation of the case. Tr. 31-32. Samples bases his objection on the doctrine of spoliation.

"The doctrine of spoliation pertains to 'the destruction or significant alteration of evidence.'" *Freight House Lofts Condo Ass'n v. VSI Meter Services, Inc.*, 402 S.W.3d 586, 595

¹¹ These pages are redacted to omit the names and personal identifying information of persons other than Samples. Samples does not object to those redactions.

(Mo.App. W.D. 2013), *quoting Baldridge v. Dir. of Revenue*, 82 S.W.3d 212, 222 (Mo.App. W.D. 2002). The penalty for spoliating evidence is not exclusion, however: “[w]hen a party intentionally spoliates evidence, that party is subject to an adverse evidentiary inference.” 402 S.W.3d at 595. The deposition therefore is admissible.

We consider, however, the potential for adverse inference because Exhibit I contains statements made by Samples that discuss his alcohol usage and are relevant to this case. We may draw an adverse inference only when “there is evidence of an intentional destruction of the evidence indicating fraud and a desire to suppress the truth.” *Id.*, *quoting Baldridge*, 82 S.W.3d at 223. Mere negligence is not enough to justify an adverse inference. *Id.*

In this case, Lytton testified that he shredded the notes of his interview with Samples (and all of his other interviews) at the time he wrote his report or the time that the Board had accepted his report.¹² There was no policy on when to shred notes, but Lytton did so because the originals were “too massive” and because he worked at home and did not want the information in the notes “laying around at home.”¹³ Lytton’s stated reasons for shredding his original notes do not show a desire to suppress the truth or induce a fraud. Rather, they simply reflect a desire to streamline his record-keeping operations and keep the information in the reports private. Samples produced no other evidence of fraud or improper purposes for destroying the notes. Therefore, we conclude that the spoliation rule does not apply here and we will not draw an adverse inference against Exhibit I.

Our decision not to draw an adverse inference against Exhibit I does not necessarily mean that we find all of the statements in Exhibit I credible. We have weighed all of Samples’ statements in Exhibit I against the remainder of the evidence in order to determine their

¹² Ex. I at 26.

¹³ *Id.*

credibility. *See Zahner v. Director of Revenue*, 348 S.W.3d 97, 101 (Mo.App. W.D. 2011) (“There is no rule of law, however, that requires the trial court to ignore the destruction of evidence—even if the trial court finds no evidence of fraud, deceit, or bad faith—when the trial court is weighing the credibility of the witnesses in an evidentiary proceeding”). We find that the majority of Samples’ statements about his alcohol use in Exhibit I are reliable evidence because they are consistent with Samples’ deposition testimony.

Conclusions of Law

We have jurisdiction over this case. § 621.045. The Board bears the burden of proving, by a preponderance of the evidence, that grounds exist to discipline Samples’ license. *See Kerwin v. Missouri Dental Board*, 375 S.W.3d 219, 230 (Mo. App. W.D. 2012) (Dental Board has burden to prove by preponderance of the evidence that dentist’s license is subject to discipline). A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.*, quoting *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo.App. W.D. 2000). This Commission judges witness credibility and may believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Registration for Healing Arts* 62 S.W.3d 446, 455 (Mo.App. W.D. 2001).

The Board alleges that there is cause for discipline under § 334.920¹⁴:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by sections 334.800 to 334.930 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

(1) Use or unlawful possession of any controlled substance, as defined in chapter 195, RSMo, or alcoholic beverage to an extent that such use impairs a person’s ability to perform the work of a respiratory care practitioner;

¹⁴RSMo 2000.

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions and duties of a respiratory care practitioner;

(12) Violation of any professional trust or confidence;

(14) Committing unethical conduct as defined in the ethical standards for respiratory care practitioners adopted by the division and filed with the secretary of state[.]

The Validity of the Breath Alcohol Test

In order to determine whether the Board has cause to discipline Samples' license, we must first determine whether Samples' breath alcohol tests were valid. Samples argues that they are not, but we conclude that the blood-alcohol tests were scientifically valid and accurate in this case.

Jeanene Jorgensen and Stephanie Nehls administered the breath alcohol tests. Both Jorgensen and Nehls completed training in the use of the AlcoMonitor. The AlcoMonitor used in both tests was recalibrated at the factory in March 2009, and the calibration was checked at Mercy on July 1, 2009, and July 1, 2010. We therefore conclude that the machine was operating correctly on the dates of Samples' tests.

Both Jorgensen and Nehls testified in detail about the procedure they went through with Samples. They complied with the standards set out by Mercy on which they had received training. The standards included verifying Samples' identity, ensuring that the straw was untampered with, entering Samples' information into the AlcoMonitor, conducting the initial test in which Samples blew through the straw, printing out the results, observing Samples for fifteen minutes after the first test to ensure that he did not eat or drink anything, selecting a

second untampered-with straw, conducting Samples' second test, and printing out those results. These standards closely tracked the standards set by the United States Department of Transportation. *See* 49 CFR § 40.241 (initial steps for a alcohol screening test); 49 CFR §40.243 (procedure for alcohol screening test); 49 CFR § 40.253 (confirmation test). Those standards are analogous in essential details to the standards set out in 19 CSR 25-30.060, operating procedures for breath analyzers in Missouri laboratories determining breath alcohol levels at the direction of a law enforcement officer. *See* 19 CSR 25-30.011(1).

We find that Nehls and Jorgensen conducted the test in accordance with established procedures based on federal and state law. The AlcoMonitor was properly calibrated. Therefore, we find that the breath alcohol test results on July 17, 2009, and July 15, 2010, are valid.

Further, the Board presented expert testimony from Brian Lutmer, Breath Alcohol Program Manager at the State Public Health Laboratory, Missouri Department of Health and Senior Services.¹⁵ Lutmer stated that, based on his review of the evidence, “there’s no reason ... to disbelieve the test results.”¹⁶ We accept Lutmer’s expert opinion, which buttresses our finding that the breath alcohol test results are valid.

Samples argues that the AlcoMonitor might have measured an aberration, that a change in barometric pressure might have affected the AlcoMonitor, that the AlcoMonitor was not properly calibrated due to use, that the air volume sensor was not properly calibrated, and that the AlcoMonitor could have been affected by “radio frequency interference.”¹⁷ He points out that the operators referred to the machine as an “AlcoMONITER” instead of an “AlcoMonitor,”

¹⁵ Tr. 165-166.

¹⁶ Tr. 185.

¹⁷ Resp. Proposed Findings at 5-6.

and that the entire contents of the AlcoMonitor's memory were not presented as evidence.¹⁸

Samples also argues that he might have had a fever on the days of the tests, that he suffers from reflux disease,¹⁹ and that the act of walking to Occupational Medicine increased his respiration rate.²⁰ Any or all of these events, he posits, could have affected the results of the breath alcohol tests.

Samples did not produce any evidence that any of the alleged events that might have interfered with the test results actually occurred. The Missouri Court of Appeals, in analyzing breath alcohol tests, has held that “[a] claim that test results are invalid will only succeed if there is evidence that a malfunction occurred in spite of the adherence of the person administering the test to correct test procedure.” *Whitworth v. Director of Revenue*, 207 S.W.3d 623, 627 (Mo.App. E.D. 2006), *quoting Novosel v. Director of Revenue*, 796 S.W.2d 894, 895 (Mo.App. E.D.1990). Samples’ lack of evidence is fatal to these arguments.

Samples also argues that the breath test results are suspect because he did not sign the test results and because the test operators misidentified the machine by misspelling its name. We disagree. Samples’ argument that he did not sign the results does not address the validity of the tests at all—and we do not believe that a clerical error such as the one here renders the tests any less valid. Further, there is ample evidence that both Nehls and Jorgensen used the AlcoMonitor for both breath tests. Samples’ argument that the misspelling of the machine’s name affected the validity of the tests lacks any support in the record.

Finally, we have already addressed, and rejected, Samples’ contention that the Board was required to introduce the entire AlcoMonitor memory printout and held that Samples, not the Board, had the duty to produce the evidence that he needed to support his claims.

¹⁸ Resp. Proposed Findings at 6-7.

¹⁹ There is no evidence of this, however, in the record.

²⁰ *Id.* at 7-9.

Subsection (1)—Use of an Alcoholic Beverage

The Board argues that Samples is subject to discipline because he used an “alcoholic beverage to an extent that such use impairs a person’s ability to perform the work of a respiratory care practitioner.” § 334.920.2(1).

The statute does not require a mere showing that Samples drank an alcoholic beverage or that he drank one at work. Likewise, the statute does not authorize discipline merely for arriving at work with a breath alcohol level above zero.²¹ The statute requires a showing that Samples’ use of alcohol impaired his ability to perform the work of a respiratory therapist.

The Board produced no evidence that Samples could not perform his duties or was impaired in any way. On both days when Samples had alcohol in his system, he was working in the hyperbaric chamber. His duties there included preparing patients for the chamber by checking their vital signs, ensuring that they were not wearing any clothing, jewelry, or other items that posed a risk for fire, operating the chamber by placing the patients in an environment with 100% oxygen and increasing the air pressure in that chamber, monitoring the patients for harmful side effects, and depressurizing the chamber after the session was over. Samples’ work in the hyperbaric chamber thus required attention to detail, professionalism, and devoted attention to patient needs.

The Board produced no evidence that Samples’ performance in the hyperbaric chamber was substandard or created any risk of patient harm. The Board only produced evidence that Samples 1) smelled of alcohol, and 2) had alcohol in his system. There was no evidence of any patient complaints and no evidence that Samples’ co-workers noticed anything out of the ordinary except that Samples smelled of alcohol. The Board’s evidence is insufficient to satisfy § 334.920.2(1).

²¹ St. Luke’s may require, as a matter of conditions of employment, that its employees be alcohol-free while at work. However, § 334.920.2(1), not St. Luke’s standards, are binding in this case.

The Board relies on *Merwin v. State Board of Registration for the Healing Arts*, 399 S.W.3d 110 (Mo.App. W.D. 2013) and *Koetting v. State Board of Nursing*, 314 S.W.3d 812 (Mo.App. W.D. 2010). *Koetting* involved a nurse absent from work due to alcohol abuse. 314 S.W.3d at 819. The Court of Appeals explicitly held that “Koetting’s disregard of her professional responsibilities by engaging in alcohol use, which causes a pattern of absenteeism, impaired her ability to work as a nurse and was subject to discipline under section 335.066.2(1).” *Id.* at 818. The court relied, in part, on the definition of professional nursing in § 335.016(15), “[t]he coordination and assistance in the delivery of a plan of health care with all members of a health team” and held that “[i]t is the unique expertise of a nurse in the setting of a health *team* that makes habitual absences from work due to alcohol misuse so critical to the performance of the duties of a licensed nurse.” *Id.*

The court then restated its holding:

[W]e find that the language “Use ... of any ... alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096,” makes clear that section 335.066.2(1) is broad enough in scope to include habitual absenteeism due to alcohol use. While a nurse may not be disciplined solely because of absence from work, when such absence is caused by alcohol impairment, and more particularly when such conduct becomes frequent or habitual, discipline under section 335.066.2(1) is appropriately invoked.

Id. at 820. Further, the court stated in a footnote that its “ruling ... is fact specific” because “Koetting’s relevant conduct was not isolated—it was habitual and it was the sort of conduct that reflected an unwillingness by Koetting to ‘coordinate and assist’ Koetting’s ‘health team,’ a responsibility that Koetting statutorily owes to her profession.” *Id.* at n.7.

Merwin involved a doctor “who experienced several absences because of his alcohol consumption.” 399 S.W.3d at 115. The doctor in *Merwin* was not fit to return to work for over one month because of “the effects of his alcohol consumption” and “his absence for that period

of time was a direct result of his alcohol consumption.” *Id.* at 115. The court of appeals held that there was cause to discipline the doctor for his misuse of alcohol based on the “statutory interpretation and reasoning in *Koetting*.” *Id.* at 116.

The Board urges us to apply *Koetting* and *Merwin* to this case. In terms of statutory interpretation, we see no reason not to apply the discussion of the statutes at issue in *Koetting* and *Merwin* to this case because the relevant statutes are identical. *Compare* § 334.920.2(1) with § 335.066.2(1) and § 334.100.2(1).

But we read *Koetting* and *Mervin* as addressing the issue of whether a healthcare professional may be disciplined based on absences that are the result of alcohol abuse. The *Koetting* court specifically held that “[w]hile a nurse may not be disciplined solely because of absence from work, when such absence is caused by alcohol impairment, and more particularly when such conduct becomes frequent or habitual,” there is cause for discipline. 314 S.W.3d at 820. The *Merwin* court specifically applied the logic of *Koetting* and held that the doctor’s “absence for that period of time was a direct result of his alcohol consumption.” Under *Koetting* and *Merwin*, it seems clear that there is cause under § 334.920.2(1) when an employee’s habitual absences from work are due to alcohol abuse. More broadly, the cases may be read to support “a finding of cause to discipline based upon the existence of off-duty conduct that interferes with job performance.” *Merwin*, 399 S.W.3d at 114.

In this case, however, Samples was never absent from work and there is no evidence that his alcohol consumption interfered with his job performance. He arrived at work on both days where he had the alcohol tests. There is no evidence that Samples had any attendance problems, or any other work-related problems that might be attributed to alcohol use.

Samples signed a “drug-free workplace agreement” with St. Luke’s after the first positive alcohol test. That agreement states that he violated St. Luke’s “Drug Free Workplace Policy”

and that he will participate in an employee assistance program (“EAP”). Under that agreement, Samples agreed to random alcohol and drug testing and to participate in “aftercare,” “evening intensive outpatient,” and Alcoholics Anonymous (“AA”) meetings. But he did not agree that he was addicted to alcohol, or not to drink alcoholic beverages at all.

Therefore, *Koetting* and *Merwin* do not control the outcome of this case. *Koetting* and *Merwin* do recognize, as does § 334.920.2(1), the general principle that impairment due to alcohol use may constitute cause for discipline. However, we have found no evidence that Samples was impaired at work due to his consumption of alcohol.

We find that there is no cause for discipline under § 334.920.2(1).

Subsection (5)—Professional Malfeasance

The Board contends that Samples committed “[i]ncompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions and duties of a respiratory care practitioner.” We disagree.

Incompetency is a “state of being” showing that a professional is unable or unwilling to function properly in the profession. *Albanna v. State Bd. of Reg’n for the Healing Arts*, 293 S.W.3d 423, 435 (Mo. 2009). Misconduct means “the willful doing of an act with a wrongful intention[;] intentional wrongdoing.” *Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm’n, Nov. 15, 1985) at 125, *aff’d*, 744 S.W.2d 524 (Mo.App. E.D. 1988). Gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty. *Id.* at 533. Fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him. *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910). It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive.

MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 359 (11th ed. 2004). Misrepresentation is falsehood or untruth made with the intent and purpose of deceit. *Id.* at 794.

We previously found that there was no evidence in the record showing that Samples was impaired based on the alcohol he consumed on the nights before his breath-alcohol tests. There is no evidence that alcohol affected the performance of his duties. We are unwilling to conclude, as a categorical rule, that the mere presence of alcohol in a person’s body renders him unable to carry out professional functions. Therefore, we find no incompetence. We also do not find misconduct. We would find arriving at work in an impaired state to be misconduct, but there is no evidence that Samples was drunk or impaired when he arrived on work on July 17, 2009 or July 15, 2010.

We consider Holloman’s testimony as expert testimony about gross negligence because Hollomon is a registered respiratory therapist and has been director of respiratory care for St. Luke’s for twenty years.²² Again, however, we do not find gross negligence because there is no evidence that Samples’ conduct demonstrated a conscious indifference to his professional duty, only that he violated a St. Luke’s policy.

The Board has presented no evidence of fraud or dishonesty.

We find no cause for discipline under § 334.920.2(5).

Subsection (12)--Violation of Professional Trust

The Board alleges that Samples is subject to discipline for “[v]iolation of any professional trust or confidence.”

The phrase “professional trust or confidence” is not defined in Chapter 335, nor has the phrase been defined in the case law. Absent a statutory definition, the plain meaning of words

²² Tr. 33-34.

used in a statute, as found in the dictionary, is typically relied on. *E&B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. 2011). The dictionary definition of “professional” is

of, relating to, or characteristic of a profession or calling...[;]...
engaged in one of the learned professions or in an occupation
requiring a high level of training and proficiency...[;]
and]...characterized or conforming to the technical or ethical
standards of a profession or occupation....

WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1811 (1986). “Trust” is

assured reliance on some person or thing [;] a confident
dependence on the character, ability, strength, or truth of someone
or something...[.]

Id. at 2456. “Confidence” is a synonym for “trust.” *Id.* at 475 and 2456. Trust “implies an assured attitude toward another which may rest on blended evidence of experience and more subjective grounds such as knowledge, affection, admiration, respect, or reverence[.]” *Id.* at 2456. Confidence “may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the subjective[.]” *Id.* Therefore, we define professional trust or confidence to mean reliance on the special knowledge and skills that professional licensure evidences. It may exist not only between the professional and her clients, but also between the professional and her employer and colleagues. *See Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo App. E.D. 1989).

Here, we find that Samples violated the professional trust of his colleagues. A respiratory care therapist “shall” perform his duties only “under the prescription, order or protocol of a licensed physician.” § 334.810.2.²³ His job description included accompanying doctors on their rounds and assisting in examinations and treatments.²⁴ His job description specified that he is a

²³RSMo 2000.

²⁴ Pet. Ex. D-57.

member of a “comprehensive healthcare team.”²⁵ Samples therefore worked as part of a treatment “team.”

Samples violated the trust of that treatment “team.” He showed up at work at least twice smelling of alcohol. His colleagues reasonably were suspicious of Samples performing his duties in the hyperbaric chamber or elsewhere in the hospital when there was a chance that he was impaired. He thus violated the trust and confidence that existed between him and his colleagues.

Subsection (14)—Violation of Ethical Rules

The Board contends that there is cause to discipline Samples because he committed “unethical conduct as defined in the ethical standards for respiratory care practitioners adopted by the division and filed with the secretary of state.” The Code of Ethics and Professional Conduct for the Board is found in 20 CSR 2255-5.010 and .020. The Board cites four provisions from that Code:

(1) All respiratory care practitioners and permit holders shall--

(A) Demonstrate behavior that reflects integrity, supports objectivity, and fosters trust in the profession and its professionals;

20 CSR 2255.5.010(1).

(1) Professional conduct in the practice of respiratory care shall not include:

(A) Committing any act which endangers patient health, safety or welfare;

(N) Failure to follow policies or procedures implemented in the practice situation to safeguard patient care;

²⁵ Pet. Ex. D-58.

(S) Use of a controlled substance or alcoholic beverage to an extent that impairs one's ability to provide safe respiratory care services.

20 CSR 2255-5.020(1).

We begin with 20 CSR 2255.010(1)(A), behavior that fosters trust. This provision is analogous to professional trust and confidence. As discussed above, we found that Samples breached his duty of professional trust and confidence. Likewise, we find here that coming to work smelling of alcohol does not inspire trust or demonstrate integrity in a respiratory therapist.

The Board presented no evidence that Samples endangered the welfare, health, or safety of any patients. There was no evidence that Samples was impaired on the date of either breath alcohol test. We therefore find no violation of 20 CSR2255-5.020(1)(A).

St. Luke's had an alcohol-free policy to safeguard the welfare of its patients. Samples violated that policy by arriving at work with alcohol in his system. He therefore violated 20 CSR 2255-5.020(1)(N).

Regulation 20 CSR 2255-5.020(1)(S) is duplicative of § 334.920.2(1). We have already found that there is no cause to discipline Samples under § 334.920.2(1). Likewise, we conclude that Samples did not violate 20 CSR 2255-5.020(1)(S) because he was not impaired while on the job.

We find cause to discipline Samples under § 334.920.2(14) because he violated 20 CSR 2255.010(1)(A) and .020(1)(N).

Summary

There is cause to discipline Samples under § 334.920.2(12) and (14). There is no cause to discipline Samples under § 334.920.2(1) and (5).

SO ORDERED on January 6, 2014.

\s\ Karen A. Winn

KAREN A. WINN

Commissioner